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The Ideals of the Rule of Law

James A. Grant*

Abstract: Choices that are underdetermined by reason, such as choices arising from incommensurability among values, involve an element of arbitrariness, and arbitrary choices are commonly thought to be inimical to the rule of law. In this article, I suggest that we should distinguish between two different ideals of the rule of law, and that the arbitrariness of some judicial choices has different implications for these different ideals. One ideal of the rule of law can be understood as ‘the rule of authority’, and the other ideal can be understood as ‘the rule of reason’. The latter ideal is opposed to decisions that lack reason, but not to arbitrary choices between undefeated reasons. The arbitrariness involved in choosing between undefeated reasons may be a deficit in one ideal of the rule of law (the rule of authority), but not a deficit in the other ideal (the rule of reason). Moreover, it is important to recognise that these are distinct ideals that can conflict, and not rival interpretations of a single ideal.

Keywords: jurisprudence, rule of law, value incommensurability, arbitrariness

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1. *Introduction*

The rule of law is usually contrasted with the rule of persons. Since the law can only rule through persons, this is usually taken to mean that the rule of law is opposed to the arbitrary power of persons. In Albert Venn Dicey's oft-cited formulation, the rule of law stands against 'the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint'.¹ In this article, I want to consider the question: is the arbitrariness entailed by rationally underdetermined decision-making contrary to the ideal of the rule of law? I will suggest that the rule of law contains many ideals, which are structured by two distinct, overarching ideals, and that these two ideals have different consequences for rationally underdetermined judicial choices, such as choices among incommensurable options. The rule of law is best understood as being opposed to decisions that are unconstrained by law, but not necessarily to decisions that are arbitrary.

The two ideals of the rule of law can be termed, for brevity, the rule of authority and the rule of reason. According to one ideal, which is the dominant one among modern legal theorists, the rule of law is presented in the image of authority, the image of existing legal rules constraining the decisions of officials, including judges. It entails that an official's decision should be able to be justified by the application of an existing, authoritative legal rule, without that

¹ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1964) 188.

official having to make a further choice or discretionary judgment. The pursuit of this ideal therefore requires the creation of authoritative legal sources capable of fulfilling the role of justifying the official's decisions. This is where the familiar requirements of this ideal of the rule of law are significant. These requirements are designed to ensure that the authoritative legal rule is capable of ruling, that it is clear, prospective, general, relatively stable and so forth. From this perspective, arbitrary choice is a problem to which the solution is the creation of authoritative legal sources, sources which can provide a determinate answer and prevent the need for an arbitrary choice in the future. That is not to say that arbitrariness is necessarily contrary to this ideal of the rule of law. Not every decision ought to be ruled by the law's authoritative rules. So an arbitrary choice will be contrary to the rule of law only if it ought to be ruled by law. But the very arbitrariness of the choice may well be one reason why it ought to be ruled by law.

According to the other ideal, far from being opposed to arbitrariness, the rule of law will often result in arbitrariness. The rule of law is captured in the image of reason—as Edward Coke put it, the common law ‘is nothing else but Reason’—and so the meaning of ‘constrained by law’ is drastically altered.² In this sense, the rule of law is the rule of reason and the ideal requires official decisions to be constrained by reason, rather than merely constrained by antecedent legal rules. When reason leaves a choice that is underdetermined by

² Edward Coke, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* (first published 1928, Francis Hargrave and Charles Butler eds, 15th edn, 1794) 97b. See also TRS Allan, ‘The Rule of Law as the Rule of Reason: Consent and Constitutionalism’ (1999) 115 LQR 221.

reason, and is therefore arbitrary, it might be thought that such a choice is contrary to the rule of law. But such a view rests on a misunderstanding of the nature of rationally underdetermined choices. These choices are compatible with the rule of reason, because, although arbitrary, they are also reasonable, that is, not contrary to reason. These choices are not a problem for the rule of reason, even though they may be a problem for the ideal of the rule of law in the sense of the rule of authority.

Before exploring these two ideals of the rule of law in more detail, some further preliminary clarifications are necessary. First, although I call these two distinct ideals, it is also important to understand that the rule of authority in a sense derives from the rule of reason. When it is legitimately called for, adherence to authority is a requirement of reason. In this way, the rule of reason will often require the rule of authority. But I call them two distinct ideals—or distinct aspects of the rule of law—to emphasise that they may require different things, pulling in opposite directions. That is to say, the requirement of adherence to legitimate authority may conflict with other requirements of reason. To the extent that the two ideals conflict, it is a conflict within the rule of reason. My claim, then, is that the rule of authority is a distinct ideal within the broader ideal of the rule of reason.

Secondly, there has been much academic debate on the question of how the rule of law is related to the concept of law, and whether the concept of law determines the rule of law or vice versa.³ I would like to bracket this

³ cf Joseph Raz, 'The Rule of Law and its Virtue' in his *The Authority of Law: Essays on Law and Morality* (OUP 1979) 223–24; Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 Ga L Rev 1, 11. One common view is that when a purported law is very deficient in the

jurisprudential debate about how the rule of law is linked to the concept of law.

While my argument may presuppose that law can be viewed as authority and as reason, we could just as well leave out the label ‘law’ and instead simply refer to the rule of authority and the rule of reason. My main concern here is with the underlying values; I am not so concerned with what we call those values.

Thirdly, it should be noted that different ideals of the rule of law are sometimes presented as rival conceptions of an essentially contested concept.⁴ This is not what I mean by different ideals of the rule of law. It is better, in my view, to understand the two ideals of the rule of law as aspects of the rule of law, not as contested ways of interpreting or understanding it. Relatedly, a fourth point that needs clarifying is how my argument relates to other presentations of different ideals of the rule of law. There are obvious parallels, but also as we shall see important differences, between the distinction that I draw in this article and the distinction that Paul Craig draws, in his influential essay, between formal and substantive conceptions of the rule of law.⁵ One problem with other accounts

requirements of the rule of law, it is not law, or at least it is not a central case of law: see Lon L Fuller, *The Morality of Law* (rev. edn, Yale UP 1969); John Finnis, *Natural Law and Natural Rights* (first published 1980, 2nd edn, OUP 2011).

⁴ On the idea of essentially contested concepts, see WB Gallie, ‘Essentially Contested Concepts’ (1955–56) 56 *Proceedings of the Aristotelian Society* 167. On the application of this idea to the rule of law, see Richard Fallon, ‘“The Rule of Law” as a Concept in Constitutional Discourse’ (1997) 97 *Columbia L Rev* 1, 6; Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ (2002) 21 *Law and Philosophy* 137, 148–53. cf John Gray, ‘Political Power, Social Theory, and Essential Contestability’ in David Miller and Larry Siedentop (eds), *The Nature of Political Theory* (Clarendon Press 1983).

⁵ Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] *PL* 467, 467. It has been said that the formal side of the ideal is better described as procedural rather than formal: John Gardner, ‘On the Supposed Formality of the Rule of Law’ in John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) 198–204. On the other hand, it has been said that the rule of law is best understood as having two aspects, one formal and the other procedural: Waldron, ‘The Concept and the Rule of Law’ (n 4) 7.

of the rule of law that draw a similar distinction to the one that I am drawing is that they either treat them as rival conceptions that we must choose between or else they go on to suggest that these ideals are in harmony with one another. In my view, it is important to recognise the tension between the two ideals of the rule of law.

Finally, let me briefly explain what I mean by choices that are underdetermined by reason, such as choices among incommensurable options. When two options are of incommensurable value, we cannot say that one option is better than another or that they are of equal value.⁶ There are undefeated reasons for each option but no conclusive reason that makes it right to choose one option over the other. It is reasonable to choose either way,⁷ but the choice, although reasonable, is also arbitrary. Incommensurability among values is not the only feature of life that can make it reasonable to choose either way. Vagueness, uncertainty, and the equality, or rough equality, of the options all give rise to similar choices. Each of these is different, but they have one important thing in common: they all entail a range of reasonable decisions, with no uniquely correct answer within that range. The result is that an arbitrary choice has to be made. The choice will not necessarily be random (it might in fact be quite predictable how someone will decide), but it will be arbitrary in the

⁶ Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 322. On the incommensurability thesis, see also John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980); Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard UP 1997); Symposium, 'Law and Incommensurability' (1998) 146 U Penn L Rev 1169.

⁷ Raz, *The Morality of Freedom* (n 9) 339: '[r]ational action is action for (what the agent takes to be) an undefeated reason. It is not necessarily action for a reason which defeats all others.'

sense that it is not required by reason.⁸ It is also worth noting that none of these types of indeterminacy is a species of relativism. When I talk about requirements of reason, I will be referring to what philosophers commonly call ‘right reason’, a non-relativist concept of reason, meaning what one really ought to do.⁹ My claim is that right reason can sometimes leave us with more than one right answer.

In this essay, it will not be possible to defend this incommensurability thesis against its critics, such as Ronald Dworkin, who argue that values are integrated and unified through interpretation, and that for this reason there ‘are no genuine conflicts of values’.¹⁰ Suffice it to say that I do not find these claims convincing, but they nonetheless contain a kernel of good sense. It is all too easy to fall into the trap of ‘lazy pluralism’,¹¹ pointing out conflicts between abstract values. Values need to be concretised or interpreted to determine what they actually require in particular circumstances, and this concretisation can often reveal options that are compatible. But I think we should also recognise that some valuable options remain in conflict, possibly giving rise to

⁸ If a judge makes this arbitrary choice, the loser who accepts that the claims were incommensurable would also accept that there was no right answer (no reason that justifies the choice of one over the other), despite his or her preference for one over the other. Of course, on the other hand, if the loser thinks the options were commensurable, he or she will think the judge’s decision was wrong.

⁹ See eg John Finnis, ‘Natural Law and Legal Reasoning’ in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (OUP 1994) 137: ‘Aristotle’s phrase *orthos logos* and his later followers’ *recta ratio*, right reason, should simply be understood as “unfettered reason,” reason undeflected by emotions and feelings.’

¹⁰ Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) 101, 119.

¹¹ Jeremy Waldron, ‘Jurisprudence for Hedgehogs (2013) NYU School of Law, Public Law, & Legal Theory Research Paper 13–45, 5, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290309> accessed 10 September 2015.

incommensurability, even when fully concretised. That, at least, is the assumption on which this essay's discussion of the rule of law will proceed.

2. *The Rule of Authority*

From Thomas Aquinas to Jeremy Bentham to, among modern theorists, Lon Fuller, John Rawls, Joseph Raz, and John Finnis, many theorists have associated the ideal of the rule of law with the guidance of conduct. On this account, the ideal requires the law to guide conduct through its antecedent, authoritative rules. The notion that, if the law is to rule and be obeyed, it must be capable of guiding behaviour is, according to Raz, 'the basic intuition from which the doctrine of the rule of law derives'.¹² This ideal of the rule of law, which Raz described as a formal one, is said to contain a number of requirements that aim to ensure that the law is capable of ruling. Among these theorists, there is, perhaps surprisingly, general agreement on the content of the rule of law's requirements. Most of the requirements are concerned with ensuring that the law is general, open, prospective, clear, stable, non-contradictory, and complied with or capable of being complied with.¹³ However, despite this general agreement on the content of the ideal's requirements, there is much less agreement on its value. Is the rule of law based on moral values? If so, what moral values justify it?

¹² Raz, 'The Rule of Law and its Virtue' (n 4) 214.

¹³ See Fuller, *The Morality of Law* (n 4) 46–94; John Rawls, *A Theory of Justice* (Harvard UP 1971) 235–43; Raz, 'The Rule of Law and its Virtue' (n 4) 214–19; Finnis, *Natural Law and Natural Rights* (n 4) 270.

One way of understanding the rule of law is to view it as merely an instrumental value. Raz has been especially prominent in articulating this understanding. The rule of law, he argued, is the ‘inherent or specific virtue’ of law, in the same way as a knife’s sharpness, its ability to cut, is the inherent or specific virtue of a knife. In both cases, the inherent virtue is an instrumental value: it can be used for bad ends as well as for good.¹⁴ Raz also argued that this instrumental value is a ‘negative virtue’, which is designed to minimise the danger of arbitrary power that the law itself creates.¹⁵ These arguments lead Raz to conclude that ‘the rule of law is an inherent virtue of the law, but not a moral virtue as such’, although he adds that the rule of law ‘is virtually always of great moral value.’¹⁶ The reduction in arbitrary power that comes with conformity with the rule of law will have moral value only if the law that is being made less arbitrary is in pursuit of good ends. Just as the sharpness of a knife does not have moral value if the knife is used as a murder weapon, so the law’s conformity with the requirements of the rule of law does not have moral value if it is used for immoral ends. That is the crux of Raz’s argument.

Other theorists, however, have disputed the argument that the rule of law is merely a means to other ends. Especially notable is Fuller’s argument that, in addition to being a means to other ends, law is also an end in itself. The end that he identifies is ‘the enterprise of subjecting human conduct to the governance of

¹⁴ Raz, ‘The Rule of Law and its Virtue’ (n 4) 225.

¹⁵ *ibid* 224.

¹⁶ *ibid* 226.

rules'.¹⁷ Although the subjection of human conduct to the governance of rules is a *distinctive* purpose of law, because other enterprises, besides law, can have that purpose, Fuller was surely right to say that it was one of the purposes of the rule of law, albeit not a distinctive one. But is this purpose really a moral ideal, an end in itself? In doubting this, HLA Hart argued that the rule of law could be regarded as a moral ideal '[o]nly if the purpose of subjecting human conduct to the governance of rules, no matter what their content, were itself ... an ultimate value'.¹⁸ That would be to mistake the means for the end, 'a classic legalist mistake', according to John Gardner.¹⁹ Playing by the rules is of moral value only if the ends are worth pursuing. The moral value of the rule of law, in other words, seems to be dependent on the moral value of the ends that the law pursues.

It might be thought that a value pluralist would be drawn to Fuller's argument, since a value pluralist is in the business of explaining that there is a plurality of values, and so might be expected to argue that the rule of law is an end in itself, or 'ultimate value', as well as a means to other ends. Yet it is not clear what could explain that value. If it is not the subjecting of human conduct to the governance of rules that explains its value, one possible explanation is that it promotes freedom under the law. According to some, liberty is a good example of a value that is both ultimate and a means to other ends. We value liberty (as an

¹⁷ Fuller, *The Morality of Law* (n 4) 96.

¹⁸ HLA Hart, 'Book Review' (1965) 78 Harv L Rev 1281, 1287.

¹⁹ Gardner, 'On the Supposed Formality of the Rule of Law' (n 8) 212.

end) from certain interferences, and we value liberty (as a means) to pursue other ends.²⁰ On this view, just as there is some value in liberty just *qua* liberty, so there is some value in following legal rules just *qua* legal rules. But these values may be outweighed by other values. It is not the case that we have liberty to do anything we want: the ideal of liberty has to take some account of the ends that we should be at liberty to pursue.²¹ In the case of evil or pointless laws, the value in following the law may be outweighed to such an extent that it seems as if it has no value at all. For in these cases what would the rule of law add? Is the thought that it gives evil laws some redeeming quality: that the law may be evil, but at least it is clearly evil?

The value in following antecedent rules is not best viewed as an end in itself. It has no intrinsic value. Following an authoritative rule is valuable only when it is an instance of legitimate authority. It is therefore dependent on the justification for the authoritative rule. My claim here is not that, when an authority is legitimate, there is value in following all of its directives. The legitimacy of the authority may be patchy, justifying only some of its directives. But provided the authoritative directive is justified as an instance of legitimate authority, there is some value in having that rule that is not limited to the values that justify the directive's legitimate authority, such as the authority's expertise, democratic legitimacy, or its ability to coordinate action for the common good.

²⁰ On this distinction between 'negative' and 'positive' liberty, see Isaiah Berlin, 'Two Concepts of Liberty' in his *Liberty: Incorporating 'Four Essays on Liberty'* (Henry Hardy ed, OUP 2002).

²¹ cf GA Cohen, *Self-Ownership, Freedom, and Equality* (CUP 1995); Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) ch 17.

There is additional value to the extent that the directive lives up to the rule-of-law requirements of clarity, generality, openness, prospectiveness, and so forth. So these requirements have value, but only when we are justified in following the authoritative rule.

This ideal of the rule of law can therefore be stated as follows: *if* conduct ought to be guided by an authoritative legal rule, then that authoritative legal rule ought to be capable of guiding conduct. A law that is capable of guiding conduct enables the law's subjects to know where they stand and make decisions accordingly, and in that way may be said to promote liberty. Freedom under the law, in this sense, is the freedom that comes with the knowability of precise rules laid down in advance of the particular circumstances.²² Yet by itself it is compatible with laws that (though clear, prospective, general, and so forth) impose all-encompassing restrictions on its subjects' lives. Freedom may be enhanced in other, more important ways: the freedom of not being subject to authority at all, or the freedom of being able to challenge authority.

That is why the ideal of the rule of law entails that *if* there ought to be governmental authority and the authority ought to be followed, it is better, from the point of view of promoting freedom, for governmental authority to adhere to the requirements of the rule of law. Thus the ideal of the rule of law is *premised* on the notion that there should be fidelity to the law, that the authoritative legal rules should be followed. If there should not be fidelity to the law in a particular case—if the reason for following the authoritative rule is defeated—

²² See Friedrich A Hayek, *The Constitution of Liberty* (Routledge & Kegan Paul 1960) 166–67; TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013) 91.

then in that case the rule of law, in the sense of the rule of authority, will not have moral value. Fuller presents the officials' duty of fidelity to the law as itself a requirement of the rule of law, or what he calls a desideratum of the inner morality of law. He calls this requirement 'the most complex of all the desiderata'. In my view, it is better understood as the underlying justification for, rather than merely the eighth desideratum of, the rule of law.²³ It is sometimes argued that the rule of law requires merely that judges and other officials follow the law, and that this duty arises even when the law's subjects are morally bound to follow the law.²⁴ As long as officials obey their duty of fidelity to the law, the rule of law is satisfied, so the argument goes, when subjects are capable of guiding their conduct, regardless of whether they choose to follow the law or are morally required to disobey it. On the other hand, it might be thought that, if the law's subjects are justified in refusing to follow the law, then officials cannot be justified in imposing the law on them.²⁵ In any case, whether it imposes more onerous requirements on officials than subjects, the core of this ideal of the rule of law—its focal meaning—includes both the guidance of conduct and the requirement of fidelity to the law.

3. Arbitrariness and the Rule of Authority

²³ Fuller, *The Morality of Law* (n 4) 81.

²⁴ Gardner calls this the 'asymmetric interpretation' of the rule of law: Gardner, 'On the Supposed Formality of the Rule of Law' (n 8) 213.

²⁵ cf Heidi Hurd, *Moral Combat: The Dilemma of Legal Perspectivalism* (CUP 1999).

When understood as the rule of authority, the ideal of the rule of law is necessarily at odds with decisions that are not determined—or at least not guided and constrained—by authoritative legal rules. This claim needs some defending, for there is a school of thought that suggests that not all arbitrariness is contrary to this ideal of the rule of law. There are, it is true, different meanings of arbitrariness. Jeremy Waldron has suggested that, in modern jurisprudence, the word ‘arbitrary’ has three meanings: ‘unpredictable’, ‘unreasoned’, and ‘without authority or legitimacy’.²⁶ These meanings are each slightly different: decisions can be unpredictable without being unreasoned, and can be unreasoned without being unpredictable; and decisions can lack authority or legitimacy, even though they are predictable and reasoned. The different meanings of arbitrariness that Waldron discusses may well reflect the various uses of the word ‘arbitrary’ in jurisprudence, but it seems to me that the second meaning—‘unreasoned’—is the odd one out in this account of the rule of law. This may sound surprising, because we tend to think, rightly in my view, that an arbitrary decision is a decision that lacks reasoned justification and is a matter of choice, a decision that is sometimes said to be reached on the basis of one’s ‘will’ rather than ‘reason’. Yet the arbitrariness that the requirements of the rule of law are concerned to reduce is the arbitrariness that comes with, not unreasoned decisions, but decisions that lack the constraint and predictability of antecedent rules. For defenders of this ideal of the rule of law, unreasoned decisions are also arbitrary and a cause for concern, but as far as this ideal of the rule of law is concerned,

²⁶ Jeremy Waldron, *Law and Disagreement* (OUP 1999) 167–68.

what matters is that there is the constraint of antecedent rules laid down by authority. There will of course be a judgment needed to create the rules, but that judgment should, on this account, be made by those in authority, not by those whose duty is to apply the authoritative rules.

Given that the application of rules often calls for moral judgment—either to interpret the rules, to fill in the gaps left by vagueness, or to decide whether or not to apply the rules—my account of this ideal of the rule of law may seem unrealistic. Vagueness in the law seems to make the rule of law in this sense an impossible ideal, and, as Timothy Endicott says, ‘[a]n impossible ideal seems romantic at best, and at worst absurd.’²⁷ Endicott has provided a more nuanced account of the rule of law, according to which vagueness and lack of constraint are not necessarily arbitrary in a way that is contrary to the rule of law.

According to Endicott, we need to distinguish between the different senses of arbitrariness and designate one sense of arbitrariness as pejorative and contrary to the rule of law. In making this argument, Endicott begins by outlining three ordinary senses of arbitrary government—lack of constraint, lack of consistency, and lack of certainty—and observes that arbitrary government in each of these three senses is often unavoidable. He then reaches the conclusion that there is not necessarily anything wrong with arbitrary government in these three senses, that they are not necessarily arbitrary in the ordinary, pejorative sense of the term.

Much of Endicott’s argument here is compelling. Especially due to the inevitable vagueness in the law, lack of constraint is often an unavoidable feature

²⁷ Timothy AO Endicott, ‘The Impossibility of the Rule of Law’ (1999) 19 OJLS 1, 4.

of adjudication. To the extent that we call this lack of constraint ‘arbitrary’, it is often relatively innocuous and, in any case, is necessary in the circumstances. While the ideal of constraining decision-makers with authoritative rules may remain a valid ideal, that ideal loses some of its relevance when there is no rule governing the issue to be decided and hence there is no alternative but to, as it were, fill in the gaps where the rule runs out. But even in these circumstances, the unconstrained judicial choice remains a deficit for this ideal of the rule of law as the rule of authority. From the point of view of this ideal, it is a deficit that ought to be remedied through the creation of new authoritative rules to avoid this unconstrained choice in the future.

Endicott, however, believes that it is necessary to change our interpretation of the rule of law. To retain the ideal of the rule of law, he argues, we need a different, pejorative sense of the arbitrary government, which is necessarily opposed to the rule of law: ‘Government is arbitrary’, in Endicott’s pejorative sense, ‘if its actions depart from the reason of the law.’²⁸ The idea of ‘the reason of the law’ is puzzling. In explaining it, Endicott refers at one point to Raz’s ‘similar sense of arbitrariness’,²⁹ which is Raz’s claim that an exercise of power will be arbitrary in a way that departs from the rule of law ‘only if it was done either with indifference to whether it will serve the purposes which alone can justify use of that power or with belief that it will not serve them’.³⁰

²⁸ *ibid*, 3.

²⁹ *ibid* 8 n 9, citing Raz, *The Authority of Law* (n 4) 219.

³⁰ Raz, *The Authority of Law* (n 4) 219.

But this is hardly much clearer. Raz and Endicott's pejorative senses of arbitrariness seem to be intended to convey the association of arbitrariness with one's 'will' rather than 'reason'. As Raz says, this makes arbitrary power essentially subjective: 'It all depends on the state of mind of the men in power'.³¹ Here is one of Endicott's clearest expressions of what he means by the pejorative sense of arbitrariness:

By an 'arbitrary act' we could simply mean, what the actor willingly does, justified (if at all) by the fact that the actor so wills, without any (other) justification of reason. ... All government decisionmaking is arbitrary in *that* sense. But I want to keep the word in its ordinary pejorative sense, so let's use it to refer to an unjustified act, a capricious or despotic act that calls for—and lacks—some justification other than the fact that the actor willed it and did it (and potentially calls for control by another authority than the actor). To sustain this pejorative sense it is essential to have criteria for which acts do and do not call for the imposition of a justification other than the mere will of the actor.³²

³¹ *ibid.*

³² Timothy Endicott, 'The Reason of the Law' (2003) 48 *Am J Juris* 83, 90.

The important point here is that arbitrary decisions will be contrary to the rule of law if they ‘call for’, but lack, a justification other than the mere will of the decision-maker. Now, surely a decision will call for a justification if we think that there *is* a justification for a particular decision. If that is how we understand the rule of law, then a decision may be contrary to the rule of law when it is unjustified, when it is contrary to reason. But if that is how we understand the rule of law, then it is not the arbitrariness of a choice that is the problem, but the fact that it is contrary to reason. Are we really still talking about the same ideal of the rule of law? It seems to me that we are talking about a different ideal of the rule of law.

There seems to be an important difference between Raz and Endicott on the extent to which the rule of law requires the creation of more determinate standards that would avoid judicial choice. For Endicott, ‘we cannot give a coherent account of the rule of law as requiring precision, because vagueness cannot be eliminated.’³³ But while complete precision, eliminating all possible indeterminacy, is impossible and undesirable, there are undoubtedly some vague laws that should be made more precise. According to Raz, there is a special requirement for judges to refrain from making arbitrary choices among incommensurable options. When reason runs out, in Raz’s view, the rule of law requires ‘distancing devices’, or some ‘artificial system of reasoning which could help determine cases where natural reason runs out, thus assuring the public that the decisions are no mere expression of personal preference on the part of the

³³ Endicott, ‘The Impossibility of the Rule of Law’ (n 35) 6.

judges.’³⁴ This claim is problematic. The reason why the rule of law is opposed to arbitrary judicial choice is not that it is opposed to choices that are underdetermined by reason, but that it is opposed to judicial decision-making on the basis of a moral judgment as to what reason requires. The rule of law, in this sense, requires judicial decisions to be constrained by authoritative rules—even though judicial decision-making unconstrained by rules may be necessary in many circumstances. On the other hand, when judges are justified in resorting to moral judgment, and moral judgment leaves a choice among incommensurable options, the resulting choice, though arbitrary, will also be reasonable—and it would be odd to require the judge to rely on an artificial form of reasoning to conceal the choice being made. But Raz may have a better argument if he is understood as saying that the arbitrariness of the choice among incommensurables may be one reason for establishing an authoritative rule for the future, in order to promote the rule of law and avoid unconstrained judicial decision-making.

But that is only one sense of the rule of law. As I will explain in the following section, the rule of law, in another sense, is opposed to unreasoned decisions, not when they are underdetermined by reason, but when they are contrary to reason. If, against this view, you think that there is only one ideal of the rule of law, the one identified in this section as the rule of authority, then you

³⁴ Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) 339. See also *ibid* 318: ‘ordinary rule-of-law considerations come into play. Only by adhering to one coherent policy can the law be made known and its application predictable.’ See also Grégoire Webber, ‘Rights and the Rule of Law in the Balance’ (2013) 129 LQR 399.

may say that we are not talking about an ideal of the rule of law at all. We are simply talking about something else. You may well be right. But my point is that, if, on the contrary, you want to frame the rule of law as a requirement to provide a reasoned justification, then it is important to distinguish that very different ideal from the ideal explored in this section. Before explaining why that is important, let us explore what that different ideal of the rule of law might look like and its implications for arbitrary decision-making.

4. *The Rule of Reason*

The claim that the rule of law is the rule of reason has a long pedigree. With its ancient roots in the Aristotelian notion that '[t]he law is reason unaffected by desire',³⁵ this ideal is most often associated with natural law theory, with all the distracting controversies that this association entails. But today it continues to play an important role. In English administrative law, for example, the term 'the rule of reason' has its origins in *Rooke's Case*, in which Edward Coke stated that, notwithstanding the fact that discretion had been conferred by authority, discretion 'ought to be limited and bound with the rule of reason and law.'³⁶ The rule of reason has now become associated with the grounds of review that Lord Greene summarised in the *Wednesbury* case,³⁷ which, according to Sir John

³⁵ Aristotle, *Politics* Book III, 1286, p 78.

³⁶ *Rooke's Case* (1598) 5 Co Rep 99b.

³⁷ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

Laws, 'exemplifies the rule of reason as a fundamental principle of the law'.³⁸

The term '*Wednesbury* unreasonableness' is often thought to refer to an extreme sense of unreasonableness. The court will not intervene unless the administrative decision is 'so unreasonable that no reasonable authority could ever have come to it',³⁹ as Lord Greene put it, adding that unreasonableness in this sense 'is not what the court considers unreasonable, a different thing altogether'.⁴⁰ What Lord Greene meant, however, was that the court will not intervene merely because it happens to disagree with the decision, when it is a decision on which 'honest and sincere people hold different views'.⁴¹ The court will only intervene when it is beyond the range of reasonable decisions. This ideal of the rule of reason entails a significantly different meaning of government under law. It is concerned not with whether decisions are constrained by rules laid down in advance, but with whether decisions are reasonable.

A feature of this ideal of the rule of law that for many theorists would count against it is that it seems to be equivalent to the rule of good law. 'If the rule of law is the rule of the good law,' Joseph Raz warned, 'then to explain its nature is to propound a complete social philosophy'.⁴² TRS Allan makes a

³⁸ Sir John Laws, '*Wednesbury*' in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Clarendon Press 1998) 186. cf Michael Taggart, 'Reinventing Administrative Law' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003) 324: '*Wednesbury* is the antithesis of the rule of reason.'

³⁹ *Wednesbury* (n 45) 230.

⁴⁰ *ibid* 230.

⁴¹ *ibid* 230.

⁴² Raz, 'The Rule of Law and its Virtue' (n 4) 211.

similar point, suggesting that a coherent account of the rule of law must enable us ‘to agree in criticising governmental action as being contrary to the rule of law even when we may disagree about the merits of rival conceptions of justice.’⁴³ Yet Allan goes on to offer an account of the rule of law as the rule of reason, arguing that ‘[a]t the heart of the ideal of the rule of law, properly understood, is a principle requiring governmental action to be rationally justified in terms of some conception of the public good.’⁴⁴ Drawing on a Rawlsian idea of public reason, Allan argues that the rule of law does not require any particular conception of the good, but it does require justification in terms of some conception of the good, provided that it is open to public scrutiny and debate, ‘appropriate for a pluralistic society’, and capable of being endorsed by everyone.⁴⁵ Moreover, Allan claims that this theory of the rule of law gives a special role to the common law, which is thought to seek to identify conceptions of the common good and the common reason of the community, consistently applied, open to scrutiny, and with the ordinary courts as its ‘exemplar’.⁴⁶

This Rawlsian idea of public reason could be interpreted as meaning either that the conception of the good offered in justification must be publicly acceptable or that it must be generally accepted in society. There is a great

⁴³ Allan, ‘The Rule of Law as the Rule of Reason’ (n 3) 221.

⁴⁴ *ibid* 231.

⁴⁵ TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 289–91.

⁴⁶ *ibid* 291. See also Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press 1992) 450. On the idea of the Supreme Court as ‘the exemplar of public reason’, see John Rawls, *Political Liberalism* (Columbia UP 1993) 236–37.

difference, however, between, on the one hand, the public being able to accept a justification and, on the other, the justification actually being accepted by most of the public. Justifications ought to be publicly acceptable—that is, made with an argument that everyone could, in principle, accept, even if people in fact disagree—but that is not to say that justifications should be made *because* they are publicly accepted. Justifications should appeal to consensus where possible, but it is less obvious that any possible consensus (assuming that one exists) should constrain justifications. Justification should be based on individual conviction, whether or not that conviction is widely shared. Allan seems to acknowledge this point when he says ‘[i]n neither legal reasoning nor political argument ... is there a sharp division between public reason and personal conviction, where legal and moral consensus disappears in the face of intractable disagreement.’⁴⁷ The rule of reason does not depend on any consensus among competing moral viewpoints.

Defending the rule of law as the rule of reason does not entail setting out a particular conception of the good. But it does entail the seemingly banal conclusion that right reason—what one really ought to do—should triumph. This answer, however, has to overcome some significant objections, the most important of which is why one’s own convictions about the requirements of reason—which, in legal disputes, in effect means the *judge’s* own convictions—should rule. The response to this objection is not that the courts are the repository of some ‘common reason’, but that judges, like everyone else, ought

⁴⁷ Allan, *Constitutional Justice* (n 53) 290.

to decide what the right thing to do is on the basis of their own convictions. The idea that it is one's own convictions that should determine the extent of one's obligations has been endorsed by a wide range of legal philosophers. From Dworkin's 'protestant' approach to legal obligation, according to which we each have a responsibility to work out the best moral interpretation of the law,⁴⁸ to Raz's observation that judges are human beings and, like everyone else, must act morally above all else, regardless of what the law says,⁴⁹ there is general agreement among legal philosophers that judges should rely on their own convictions of what the right thing to do is when deciding cases. Of course, that does not mean that judges should ignore the decisions of others. The morally right thing to do might be to defer to the decision of a legitimate authority, even though one would otherwise, in the absence of that decision, have reached a different conclusion about what the right thing to do is.

In the context of the ideal of the rule of law, let us recall Endicott's suggestion that, instead of requiring conformity with right reason, the rule of law is a requirement to act in accordance with 'the reason of the law'. According to Endicott, the ideal of the rule of law is achieved when the law controls what it ought to control, what it is good at regulating, a question that he acknowledges requires a moral judgment.⁵⁰ And yet, on his account, 'it still makes sense to

⁴⁸ Ronald Dworkin, *Law's Empire* (Harvard UP 1986) 413. This is also Allan's view: see eg Allan, *The Sovereignty of Law* (n 27) 165: 'a "protestant" approach will leave little, if any, space between the content of law and independent moral conviction.'

⁴⁹ Joseph Raz, 'Incorporation by Law' (2004) 10 *Legal Theory* 1, 2–7.

⁵⁰ Endicott, 'The Reason of the Law' (n 38) 86.

distinguish between the rule of law and the rule of good law.’⁵¹ It makes sense because, for Endicott, the relevant moral judgment is taken to be a judgment ‘from the legal point of view’, restricted by ‘the general principles of the law of a community’—which is what he means by the reason of the law.⁵² Thus a decision will be arbitrary in the pejorative sense when the decision is inconsistent with the principles of the law, with the reason of the law. But the reason *of the law* can be, from one’s own moral point of view, ‘more or less reasonable but also more or less unreasonable’.⁵³ And so, on Endicott’s account, although the content of the rule of law requires a moral judgment, the decisions that the rule of law treats as arbitrary—that is, in his special pejorative sense of contrary to the reason of the law—might not be the same as the decisions that one’s own moral judgment treats as contrary to reason.

This is not, in my view, the best way to understand the rule of reason. If there is indeed an ideal of the rule of law as the rule of reason, it is best understood as the rule of reason in the sense of our own judgment about what is in accordance with right reason. It is possible to recognise this as an ideal of the rule of law and nonetheless maintain a distinction between the rule of law and the rule of good law. There may be a content-independent justification to follow an authoritative legal rule even though the content of the legal rule is morally deficient in some way. But if the rule of reason is a distinct ideal of the rule of

⁵¹ Endicott, ‘The Impossibility of the Rule of Law’ (n 33) 11 n 12.

⁵² *ibid* 11–12.

⁵³ Endicott, ‘The Reason of the Law’ (n 38) 106.

law, then it must entail that sometimes judges should decide cases on the basis of what is in accordance with right reason, even if to do so conflicts with what the authoritative legal rule says.

You may say that reason should rule in adjudication anyway, regardless of whether this requirement can be described as an ideal of the rule of law. That was Raz's view and he was right. It might even be questioned whether there is something misleading about describing the rule of reason as the rule of law. But addressing this claim would take us too far into intricate debates in legal philosophy that are outside the scope of this article. Moreover, it is not clear that the question of which considerations relevant to judicial decision-making we call 'law' is as important as some legal philosophers believe. As long as we are clear about when judges are applying authoritative rules laid down in advance and when they are applying their own standards of reasonableness, does it really matter which premises in judicial reasoning we call law?⁵⁴ Without wishing to answer these questions here, my point in this section is simply that, *if* the rule of law can be understood as the rule of reason, then, on the most satisfactory account, it is the rule of our judgment about what right reason requires. This judgment includes content-independent reasons for following authority as well as content-dependent reasons that go to the substance of the decision. The rule of reason will usually, but not always, require the rule of authority.

⁵⁴ For a similar point, see Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism' (2011) 31 OJLS 663. See also Timothy Endicott, 'Adjudication and the Law' (2007) 27 OJLS 311.

5. *Arbitrariness and the Rule of Reason*

The rule of reason has a distinct relationship to arbitrariness. Arbitrariness may be incompatible with the ideal of the rule of authority, even though it is compatible with the rule of reason. A decision is arbitrary if it lacks reason, but an arbitrary decision is not necessarily contrary to reason. A choice between incommensurable options is an example of an arbitrary decision that lacks reason but is not contrary to reason—that is, the choice is arbitrary because there is no conclusive reason for one option over the other, but it is not contrary to reason because there is an undefeated reason for each of the options.

The idea that reason can require a judge to make an arbitrary choice between incommensurables is also emphasised in Endicott's account of the rule of law. 'Resolution is a basic requirement of the rule of law,' he writes. 'It is important when it is indeterminate what justice or the law requires, and when the various incommensurable requirements of good judicial decision-making conflict with each other, and even when there is no just outcome'.⁵⁵ Endicott seems to suggest that resolution is a general requirement, but I am not sure whether that is what he intended to suggest.⁵⁶ For there may be some issues that should be left unresolved in judicial disputes, perhaps because those issues are better resolved

⁵⁵ Endicott, 'The Impossibility of the Rule of Law' (n 33) 13–14.

⁵⁶ *ibid* 15. cf Scott Veitch, *Moral Conflict and Legal Reasoning* (Hart Publishing 1999) 164 (emphasis in original): 'as the case gets harder, it becomes *less rational* to decide it.'

by other people.⁵⁷ But Endicott also writes that the need for resolution in judicial disputes is a special responsibility of judges, because ‘the need for resolution never overrides the need for justice and the need for legality.’⁵⁸ This is far from clear, however, as Endicott himself acknowledges when he writes that ‘it seems as if legality and justice do not matter’ in cases in which there is ‘no legal or moral reason to choose one resolution rather than another’.⁵⁹ Nonetheless, judges are often required by reason to resolve disputes between incommensurable options.⁶⁰ In doing so, they inevitably act arbitrarily, but not in a way that causes a problem for the rule of law in the sense of the rule of reason.⁶¹ Only if the reasons that apply to the judge also call for an authoritative legal rule—even though no such rule may currently exist—will the arbitrary choice be contrary to the rule of law, in the sense of the rule of authority.

The compatibility between arbitrariness and the rule of reason suggests that, if two options really are incommensurable, then it may not be contrary to the rule of reason for the judge to choose between them by flipping a coin. As we shall see, there is a reason for judges to avoid flipping coins; however, perhaps

⁵⁷ I think Scott Veitch exaggerates the extent to which judges should leave issues unresolved: see Veitch, *Moral Conflict and Legal Reasoning* (n 62) 169–71.

⁵⁸ Endicott, ‘The Impossibility of the Rule of Law’ (n 33) 16.

⁵⁹ *ibid* 16.

⁶⁰ As Endicott says, this idea is well captured in Aristotle, *Politics* III.16: ‘Where it seems that the law cannot draw a boundary, it would seem impossible for a human being to identify one. Yet the law trains officials for that very purpose, and appoints them to judge and to regulate that which leaves undetermined, as rightly as they can.’

⁶¹ cf Endicott, ‘The Impossibility of the Rule of Law’ (n 33) 16: ‘It will not be arbitrary in our fourth sense of abandoning the reason of the law, because the need for resolution is itself a general legal reason to resolve disputes, and there is no conclusive reason against the resolution in question.’

surprisingly, I do not think that the reason is because of an inherent injustice in flipping coins to decide legal disputes. It is not as easy as it might intuitively seem to find anything wrong with a judge, faced with a dispute between incommensurable options, using the quintessentially impartial device of flipping a coin.⁶² Indeed, a coin flip or something similar would have the merit of explicitly acknowledging the lack of justification.⁶³ Endicott argues that the following is a conclusive reason against judges flipping coins in these situations: ‘a need for judicial discipline ... a discipline against corruption and prejudice and wilfulness’.⁶⁴ This is not entirely convincing, however, for surely flipping a coin would sometimes be quite a good way of preventing corruption, prejudice, and wilfulness. Yet there is a reason against flipping coins, which may well be conclusive. The risk is that a judge might adopt this approach even when the options are commensurable and the decision is determined by reason. Indeed, there have been instances in which judges, and juries, have done just that.⁶⁵ While our unease with judges flipping coins is most often explained by pointing to our dislike of decisions being made randomly or irrationally,⁶⁶ some degree of irrationality is unavoidable in circumstances where there are incommensurable

⁶² For a more wide-ranging account of random approaches to judicial decision-making, see Neil Duxbury, *Random Justice: On Lotteries and Legal Decision-Making* (OUP 2002).

⁶³ Frank I Michelman, ‘Dilemmas of Belonging: Moral Truth, Human Rights, and Why We Might Not Want a Representative Judiciary’ (2000) 47 UCLA L Rev 1221, 1244.

⁶⁴ Endicott, ‘The Impossibility of the Rule of Law’ (n 33) 16–17.

⁶⁵ See eg *International Herald Tribune* (New York, 30 September 1991) 6, cited in Brian Bix, *Law, Language, and Legal Determinacy* (Clarendon Press 1993) 106.

⁶⁶ Bix, *Law, Language, and Legal Determinacy* (n 71) 106.

options. It is only reasonable to resist the practice of flipping coins in such circumstances because the practice may spill over into other circumstances.

When making a choice between incommensurable options, judges act in the way that any other decision maker would act. According to HLA Hart, there are ‘characteristic judicial virtues’ that can distinguish judicial decision making from the kind of choice exercised by legislatures, such as ‘impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision’.⁶⁷ Not only are these not distinctively judicial characteristics, but also it is not clear how these virtues are supposed to assist the judge when choosing between incommensurable options. While Hart acknowledges that morality might not provide a right answer when legal sources fail to determine the outcome, he insists that judges may be able to make an impartial choice through ‘the “weighing” and “balancing” characteristic of the effort to do justice between competing interests.’⁶⁸ It is true that judicial reasoning will often be different from other types of reasoning, because judges have to contend with certain moral duties, such as the defeasible obligation to apply the authoritative legal rules, which do not apply, or do not apply with

⁶⁷ HLA Hart, *The Concept of Law* (first published 1961, 3rd edn, Clarendon Press 2012) 205. It is worth noting here that, in this passage and elsewhere, Hart thought that, in general (i.e. not merely judicial) reasoning, discretion in cases not guided by principles—and presumably in cases involving incommensurable options—should not be described as an arbitrary choice: see also HLA Hart, ‘Discretion’ (2013) 127 *Harvard L Rev* 652, 665.

⁶⁸ Hart, *The Concept of Law* (n 74) 205. cf Bix, *Law, Language, and Legal Determinacy* (n 71) 105: ‘the underlying idea is that there is more than one right answer in some legal cases only because the law requires or offers only a limited set of sources, principles, and duties; with the addition of other moral principles, policy considerations, or perhaps aesthetic considerations, there might yet be unique right answers.’

equal force, to other decision makers, especially in the legislature. When the legal sources are indeterminate, judges may face a choice that is, in essence, the same as a legislator's choice. The same is true when the requirements of reason conflict incommensurably.

You might think that when one of the reasons that conflicts incommensurably is the reason for applying an existing legal rule, then certain constitutive features of the judicial role make this choice different from other kinds of choices, because the judicial role is, by its very nature, about applying legal rules laid down in advance. Judges, on this view, should only depart from existing standards when they are defeated by reason, not simply when there are (otherwise) undefeated reasons in favour of another option. But it seems to me that the reasons for and against following authoritative rules may be incommensurable, even for judges.⁶⁹ Though the reasons that judges must contend with may differ a legislator's reasons, the way in which reasons must be assessed does not.

6. *The Plurality of the Ideals*

Although many others have drawn attention to the two sides of the rule of law, the conventional wisdom is that the two sides can always be reconciled. 'Though the two conceptions compete as ideals of the legal process (because ... they recommend different theories of adjudication),' Dworkin writes, 'they are

⁶⁹ See James Grant, 'The Scales of Authority' (2015) 60 Am J Juris 79.

nevertheless compatible as more general ideals for a just society.’⁷⁰ Most theorists who draw attention to the two aspects of the rule of law argue that the ideal is an interpretative enterprise along the lines of Dworkin’s conception of law as integrity. They tend to argue that the rule of law aims ‘at coherence and consistency’,⁷¹ and that ‘with sensitivity to context’ its competing values may be resolved in a way that eliminates any conflict.⁷² On this account, conflicts can be resolved by reasons implicit in the corpus of common law and statute, so that ‘[t]he judge has no discretion, in the sense of scope for exercising will or choice’.⁷³ This is thought to provide a distinctively judicial standard of impartiality, to which, according to Allan, other officials should adhere as closely as possible: an official’s decision ‘must be not only *authorized*, falling within the scope of its jurisdiction, but *fair and reasonable*.’⁷⁴ But the problem with this account is that it pays insufficient attention to situations in which an official’s decision is authorised but not otherwise fair and reasonable, or in which an official’s decision is fair and reasonable but not authorised.

I am not suggesting that the two ideals of the rule of law are never reconcilable. As I explained at the outset, the rule of reason is the ultimate ideal because, in most contexts, it requires judges to apply authoritative legal rules. In

⁷⁰ Ronald Dworkin, *A Matter of Principle* (Harvard UP 1985) 12.

⁷¹ Mark D Walters, ‘Legality as Reason: Dicey, Rand, and the Rule of Law’ (2010) 55 McGill LJ 563, 585.

⁷² Allan, *The Sovereignty of Law* (n 27) 99.

⁷³ *ibid* 107.

⁷⁴ *ibid* 108 (emphasis in original).

these contexts, the two ideals are harmonious, forming a consistent whole. But there is a danger in drawing the conclusion that, as Sir John Laws says, ‘the rule of reasonableness is the condition of all legality’:

[T]he voice that says public authority must obey the statute insists in the same breath that public authority has to bring a reasonable mind to bear upon its duties. There is in the end no distinction between these imperatives. To acknowledge the limits of one’s power set by Parliament *is* to bring a reasonable mind to bear upon its exercise.⁷⁵

Although we should acknowledge that the rule of authority is an ideal only to the extent that it is reasonable for the authority to rule, we should also acknowledge the distinctiveness of, and the possibility of conflict between, the two ideals. The rule of reason can sometimes require the rule of authority, but there are other requirements of reason and these can conflict with the requirement to follow authority. We should not be duped into thinking that the rule of reason can control the interpretation of authority so that the two ideals of the rule of law do not really conflict.

Once we understand that the two ideals are distinct, it is not difficult to see that a lack of conformity with the ideal of the rule of law as the rule of authority, though a matter for some regret, may be a good thing, all things

⁷⁵ Laws, ‘*Wednesbury*’ (n 43) 195.

considered. The rule of law, as Raz puts it, ‘has always to be balanced against competing claims of other values. ... Conformity to the rule of law is a matter of degree, and though, other things being equal, the greater the conformity the better—other things are rarely equal.’⁷⁶ Fuller makes a similar point when he says that one of the most obvious demands of the rule of law—the demand ‘that a rule passed today should govern what happens tomorrow, not what happened yesterday’—can sometimes conflict with other values and, if treated as absolute, would ‘disserve the cause of legality.’⁷⁷ Opponents of judicial activism have sought to use this account of the rule of law as the rule of authority to argue against the inevitable increase in judicial power and ad hocism that comes with vague criteria such as doctrines of reasonableness and proportionality.⁷⁸ But Fuller rightly saw the problem of judicial empowerment as one of degree: his main concern—what he described as the first route to disaster for a system of law—was ‘a failure to achieve rules *at all*, so that *every* issue must be decided on an ad hoc basis’.⁷⁹ He understood that a ‘utopia’ of legality, in which his eight desiderata are perfectly satisfied, ‘is not actually a useful target for guiding the impulse toward legality’.⁸⁰

This sensible, pluralistic approach to the rule of law is not something that depends on restricting the rule of law to the rule of authority. That said, I think it

⁷⁶ Raz, *The Authority of Law* (n 4) 228.

⁷⁷ Fuller, *The Morality of Law* (n 5) 44.

⁷⁸ See eg Webber, ‘Rights and the Rule of Law in the Balance’ (n 40) 400.

⁷⁹ Fuller, *The Morality of Law* (n 5) 39 (emphasis added).

⁸⁰ See eg *ibid* 41.

is striking, though you may say not especially surprising, that most proponents of the rule of reason as an ideal of the rule of law have been theorists who insist on the unity of value. Against the sensible view of Raz and Fuller, exponents of a unified approach to the rule of law find the idea of choosing between the rule of law and other values ‘bewildering’, arguing that ‘the ideal of the rule of law precludes making any sacrifices of it.’⁸¹ This is not merely an overvaluation of the rule of law. It betrays a profound misunderstanding of the nature of the ideal. From the sound insight that the rule of law is more than the requirements necessary for the rule of authority, these theorists adopt an overly interpretative approach that seeks coherence among the different meanings of the rule of law. The resulting unity, in their eyes, entails that the officials’ duty of fidelity to law is almost absolute, with the law being interpreted in a way that, as far as possible, is in accordance with morality.

This unifying approach to the rule of law can be seen in an essay on the rule of law by Michael Oakeshott, in which he drew attention to two sides of the rule of law: the side that emphasises formal requirements of ‘authenticity’ (*lex*) and the side that emphasises substantive requirements of ‘rightness’ (*jus*). Oakeshott conflated these two sides, arguing that they could be unified by the notion of rendering justice according to law (the ‘*jus* of *lex*’). The substantive requirements of rightness, he says, are determined by arguing about the meaning of an authoritative legal rule in respect of its application in a particular case, not

⁸¹ David Dyzenhaus, ‘The Legitimacy of the Rule of Law’ in David Dyzenhaus, Murray Hunt, and Grant Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing 2009) 40, 42.

by considering what is in the public interest or what is right.⁸² Oakeshott says that the *jus* of *lex* is not merely a matter of faithfulness to the formal character of law, but also invokes ‘the negative and limited consideration that the prescriptions of the law should not conflict with a prevailing educated moral sensibility’ capable of determining the kind of conditions that should be imposed by law.⁸³ But although *jus* and *lex* are to be distinguished, the rule of law on this account is about the rule of *lex* and about the *jus* inherent in *lex*, not about the rule of *jus* in the sense of the rule of reason that I set out in the previous section.⁸⁴

One particularly striking feature of some unifying accounts of the rule of law is the suggestion that judges should not change the law. While most theorists who make this claim accept that judges often make political judgments when interpreting the law, they argue that, in doing so, judges do not (or at least should not) make decisions that are inconsistent with the law laid down in advance. Nigel Simmonds makes a particularly strong version of this argument when he argues that judges cannot have a power to modify the law, because if they did, the ‘rule-as-modified’ would be ‘applied in the very case that gave rise to the modification, so that all such cases would have to be regarded as the most serious departures from the rule of law.’⁸⁵ When judges conform to the rule of

⁸² Michael Oakeshott, ‘The Rule of Law’ in his *On History and Other Essays* (Liberty Fund 1999) 159.

⁸³ *ibid* 173–74.

⁸⁴ *ibid* 168–69.

⁸⁵ Nigel Simmonds, *Law as a Moral Idea* (OUP 2007) 162.

reason and apply standards not found in the authoritative sources, the unifying account seeks to hold judges to the same requirements as those associated with the ideal of the rule of authority and freedom under the law. ‘If legality is related to the idea of freedom as independence,’ Allan writes, ‘we must suppose that the content of common law rules is, in principle, knowable in advance of action that might infringe them: we should not have to await retrospective judicial pronouncement.’⁸⁶ For Allan, the requirement of knowability can be satisfied because, although a court’s justification for its decision may at times be politically contentious, the rule of reason can be based on shared criteria of justice.⁸⁷

There is much at stake in disputes over the meaning of the rule of law. What is at stake is nothing less—and quite a lot more—than the questions of how judges should decide cases, of how to understand what judges do when they decide cases, and of the implications of value pluralism for judicial reasoning and decision-making. But it would be a mistake to think that one could not have a sound understanding of adjudication if one thought that the rule of reason should not be included within the meaning of the rule of law. This is a mistake that Dworkin made when he wrote, somewhat confusingly, that ‘[t]hough the two conceptions [of the rule of law], as general political ideals, may both have a place in a full political theory, it makes a great difference which is taken to be

⁸⁶ Allan, *The Sovereignty of Law* (n 27) 122.

⁸⁷ Allan, ‘The Rule of Law as the Rule of Reason’ (n 3) 241, citing Hayek, *Law, Legislation and Liberty* (n xxx) 118: ‘Only if one believes that all law is an expression of the will of a legislator and has been invented by him, rather than an expression of the principles required by the exigencies of an ongoing order, does it seem that previous announcement is an indispensable condition of knowledge of the law.’

the ideal of *law* because it is that ideal which governs our attitudes about adjudication.’⁸⁸ The main problem with Dworkin’s account is that, in distinguishing between the ‘rule-book’ and the ‘rights’ conceptions of the rule of law, he treated these ideals as alternative ways of viewing the ideal of the rule of law. Only those who adopt the latter conception, he argued, are capable of accepting that the courts should enforce the moral rights that the parties actually have. Arguing that we should reject the rule-book conception, Dworkin acknowledged that the rules laid down in advance exert an influence on the question of what moral rights the parties have.⁸⁹ But that influence, he maintained, does not give rise to a conflict with other principles: rather, it frames the moral rights that the parties have, so that any moral principles that are inconsistent with the rule book have no place in adjudication.⁹⁰ For Dworkin and other like-minded theorists, then, the requirements of the rule of law are unified and harmonious with one another.

This argument is not surprising when it comes from those who reject the incommensurability thesis. But more surprising is the apparent assumption of commensurability in the writings on the rule of law of some theorists who accept the incommensurability thesis. I think that Raz, for example, made such an assumption, despite his explicit intention to expound an account of the rule of law appropriate for a pluralistic society. In an essay entitled ‘The Politics of the

⁸⁸ Dworkin, *A Matter of Principle* (n 77) 13 (emphasis in original).

⁸⁹ *ibid* 16–17.

⁹⁰ *ibid* 17.

Rule of Law', Raz made a slight shift towards embracing something like the rule of reason as an ideal of the rule of law, arguing that the rule of law sets limits on the will of the legislature: 'It requires principled, as well as faithful, adjudication.'⁹¹ That much I think is right. But Raz then appears to make two contradictory arguments: on the one hand, he criticises the idea of common law reason, arguing that it gives too much power to the common law courts and is therefore not suitable for a pluralistic society; on the other hand, he argues that the principled adjudication that the rule of law requires is based on the 'common values and shared practices of the legal culture'.⁹² Raz insists that these arguments are not contradictory, because the common legal culture is shaped by legislation as much as by judicial practices. However, he goes on to say that 'the function of the rule of law is to facilitate the integration of particular pieces of legislation with the underlying doctrines of the legal system.'⁹³

The assumption of commensurability in the ideals of the rule of law among those who accept the incommensurability thesis can also be seen in Endicott's account of the rule of law. He argues that, although the rule of law may seem to require precision, 'we cannot give a coherent account of the rule of law as requiring precision, because vagueness cannot be eliminated.'⁹⁴ Endicott's argument here is that some norms, such as the prohibition on torture, cannot be

⁹¹ Joseph Raz, 'The Politics of the Rule of Law' in his *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev. edn, Clarendon Press 1994) 374.

⁹² *ibid* 375.

⁹³ *ibid* 375.

⁹⁴ Endicott, 'The Impossibility of the Rule of Law' (n 33) 6.

made more precise without defeating the purpose of having those norms. A norm that stated precisely what does and does not constitute torture would be useless, the argument goes, because it would be unable to cope appropriately with the complexity of the situation and people ‘could not take it as a guide for their conduct—so it would be no advance towards the rule of law.’⁹⁵ The attractiveness of this argument is attributable not only to the belief that a precise rule is impossible, that vagueness is inevitable, and that therefore we ought not to have impossible ideals. It is also attributable to the belief that precise rules, even when they are possible, are often over-inclusive and under-inclusive, and in this way the increase in precision in the law can often lead to an increase in arbitrariness. For Endicott, this arbitrariness is pejorative, going against the reason of the law.⁹⁶ Even if it is not arbitrariness that is the problem, there seems to be a problem with precise rules stemming from our revulsion to what Oliver Wendell Holmes described as the ‘bad man’, who wants a precise definition of torture so that he knows precisely what he can get away with, without actually crossing the line.⁹⁷ These problems with precise rules lend support to the idea that, when we want reason and not authoritative legal rules to rule, we do not compromise the ideal of the rule of law.

But what I think Endicott does not adequately acknowledge is the possibility that, although we may not compromise the rule of law in the sense of

⁹⁵ *ibid* 6.

⁹⁶ *ibid* 8–9.

⁹⁷ See Jeremy Waldron, ‘Torture, Suicide and *Determinatio*’ (2010) 55 *Am J Juris* 1, 12. On the ‘bad-man’ attitude, see Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 *Harvard L Rev* 457

the rule of reason, we do compromise the rule of law (perhaps justifiably in the case of defining torture) in the sense of the rule of authority. Even in the example of prohibiting torture it is possible to think of opposing values at stake in the question of how precise the standard ought to be.⁹⁸ The arbitrariness of precise laws may well be a loss for the rule of reason, but precise laws are a gain for the rule of authority. The reverse is also true: the arbitrariness of vague standards is a loss for the rule of authority, but vague standards may be a gain for the rule of reason. Often the gain in one will outweigh the loss in the other, but we should not rule out a priori the possibility that the two options may be incommensurable in some contexts.

In recognising two different ideals of the rule of law, then, we can see that they not only have different implications for arbitrariness, but also may conflict with one another in other ways: one ideal demands determinate and authoritative legal rules that have a high degree of certainty to their application in particular circumstances; the other ideal is more concerned with whether the decision in the particular circumstances is in accordance with right reason. If we bracket the jurisprudential debate about whether law can include things other than authoritative sources, then you could accept the main arguments of this article and yet believe that the rule of authority is the only ideal of the rule of law. But as soon as you start to talk about the rule of law along the lines of the rule of reason, it is important not to lose sight of the plurality of, and conflict between, the ideals that go to make up the rule of law. The rule of law may not

⁹⁸ cf John Finnis, 'Nationality, Alienage and Constitutional Principle' (2007) 123 LQR 417, 429 n 58; Waldron, 'Torture, Suicide and *Determinatio*' (n 104) 25.

be, as some suggest, ‘an impossible ideal’.⁹⁹ But it is a complex cluster of ideals, which are often irreconcilable.

⁹⁹ Martin Loughlin, *Foundations of Public Law* (OUP 2010) 337.